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No. 91 - 30

In the Supreme Court of the United States

OCTOBER TERM 1991

IMPERIAL IRRIGATION DISTRICT,
Petitioner,

v.

STATE WATER RESOURCES CONTROL BOARD,
Respondent,
ENVIRONMENTAL DEFENSE FUND, INC.
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF OF AMICUS CURIAE COACHELLA VALLEY WATER DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Coachella Valley Water District respectfully submits this Amicus Curiae Brief in Opposition to the Petition for Writ of Certiorari to the Court of Appeal, Fourth Appellate District, Division One.

INTEREST OF COACHELLA VALLEY WATER DISTRICT

Coachella Valley Water District is a county water district located in Riverside County, California, operating pursuant to the County Water District Law. (California *Water Code* §§ 30000 *et seq.*) Organized in 1918, one of Coachella's principle activities is to provide irrigation water service to, and agricultural drainage service form, approximately 60,000 acres of agricultural lands in the Coachella Valley.

Pursuant to a contract entered into with the Secretary of the Interior under Section 5 of the Boulder Canyon Project Act (45 Stats. 1057, 43 U.S.C. §§ 617 et seq.), Coachella obtains water form the Colorado River through the All American Canal. [Wilbur & Ely, *The Hoover Dam Documents*, pp. A633-A658 (1948).] Coachella's contract, like all California public agency contracts with the Secretary, incorporates the priority scheme of the Seven Party Agreement which allocated priorities to California's share of the waters of the Colorado River among the California public agency users. (*Id.* at pp. A479-A483.) Under the Seven Party Agreement, the majority of the third priority (defined as 3.85 million acre feet per annum less the amounts used by priorities one and two) is allocated "to Imperial Irrigation District and other lands under or that will be served from the All American Canal in the Imperial and coachella Valleys.' (*Id.* at p. A480.) The 1934 Compromise Agreement between Coachella and Imperial Irrigation District gives IID the first right to the use of this water for irrigation and potable purposes if put to reasonable and beneficial use. (*Id.* at pp. A621-A631.) If IID's use exhausts the third priority, Coachella would receive no water in a time of shortage since Coachella's next priority is the sixth priority and the 4.4 million acre feet

per annum allocated to the State or California by this Court's decree is insufficient to satisfy any requirements beyond the fourth priority. [*(Arizona v. California,* 376 U.S. 340, 341 (1965).)] Thus, every drop conserved and not wasted by IID is a drop made available to Coachella, and if not used by Coachella, is then made available to those further down the line in the priority system.[1] Accordingly, Coachella is strongly interested in promoting water conservation and preventing waste by the imperial Irrigation District and, for this reason, participated in the hearings before the State Water Resources Control Board that resulted in the challenged order.

Coachella has an additional interest in promoting water conservation by Imperial Irrigation District. Coachella's agricultural drainage system disposes of the drainage water into the Salton Sea, which is the same location where the water wasted by IID flows. As a result of the wasteful practices of IID during the 1970's and 1980's, there was a significant rise in the Salton Sea resulting in flooding that caused substantial property damage to shoreline properties. Many shoreline owners have brought inverse condemnation and damage actions in state and federal court against IID and Coachella. (See, *Salton Bay Marina, Inc. v. Imperial Irrigation District,* (1985) 172 Cal. App. 3d 914, 927-928, 218

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[1] IID's Petition spends much time complaining about the benefits that the Metropolitan Water District of Southern California may receive from the State Board decision challenged in this proceeding, and argues that this is incompatible with the Project Act's purpose of fostering irrigation (Petition at pp. 13-14, 18-19, 28-29) while conveniently omitting the fact that Coachella, one of its sister agricultural agencies, is the immediate beneficiary of any conservation and stands between IID and the Metropolitan Water District in the priority system.

Cal. Rptr. 839.)[2] Thus, Coachella is vitally interested in stabilizing and lowering the level of the Salton Sea which can only be accomplished through the implementation of conservation measures to prevent the waste of water by Imperial Irrigation District.

THE BOULDER CANYON PROJECT ACT DOES NOT PRE-EMPT THE STATE WATER RESOURCES CONTROL BOARD'S AUTHORITY OVER PETITIONER'S WATER MANAGEMENT PRACTICES

This case is about a challenge to the power of the State of California, acting through one of its regulatory agencies, the State Water Resources Control Board, to control the wasteful water practices of one of its political subdivisions, Imperial Irrigation District. Having twice failed to persuade the California Court of Appeal that such action was not authorized by California law, IID now seeks relief from this Court, arguing for the first time in its Petition that the Board's authority is completely pre-empted by the Boulder Canyon Project Act. Coachella disagrees with this contention and urges the Court to deny the Petition.

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[2] Among the actions still pending is an action in the United States District for the Southern District of California brought by the United States of America seeking damages for the Torres Martinez Indian Reservation and seeking an injunction prohibiting defendants from maintaining the level of the Salton Sea so as to inundate the lands of the Torres Martinez Indian Reservation. (*The United States of America, in its own right and on behalf of the Torres Martinez Ban of Mission Indians and allotees therein, plaintiff vs. The Imperial Irrigation District, a public irrigation district; and Coachella Valley Water District, a public irrigation district, defendants,* Civil No. 82-1790.)

A. The Need For State Regulation

It is important to note why the State Board first became involve in this matter. During the 1970's a change in IID's water management policies resulted in several wasteful practices which increased in-flows to the Salton Sea, causing the Sea to rise and to flood shoreline properties. (*Salton Bay Marina, Inc., supra.*) One of those property owners, John Elmore, a farmer, requested the State Department of Water Resources to investigate these practices. The Department's report identified a potential for conserving 438,000 acre feet of water per annum and asked IID to prepare a conservation plan. When IID refused, the Department referred the matter to the State Board for adjudication which culminated in the Board's decision number 1600 that ordered IID to undertake certain specified conservation measures and to prepare and implement a detailed and comprehensive water conservation plan. (*Imperial Irrigation District v. State Water Resource Control Board,* 186 Cal. App. 3d 1160, 1163; 231 Cal. Rptr. 238 (1986); Decision 1600, Section 3.0., Pet. App. Doc. 10, p. 151.)

Meanwhile, Elmore filed a proceeding in state court seeking a writ of mandate to compel IID to comply with the state constitutional and statutory provisions to conserve water. In that action, the California Court of Appeal ruled that under California law IID "has a clear, mandatory duty to avoid wasting water, prevent flooding and provide drainage." [*Elmore v. Imperial Irrigation District,* 159 Cal. App. 3d 185, 193; 205 Cal. Rptr. 433 (1984).]

It was within this context of incredible water waste and significant property damage that the State Board acted to control IID's water management practices. The Board was also furthering the strong California public policy, reflected

in the California Constitution, statutes and case law, to prevent water waste.

At the turn of the century, the California Supreme Court observed with some prescience that:

> Charms of the climate have drawn, and will continue to draw, immigrants from the better classes of the eastern states, composed largely of men of experience and means, energetic, enterprising, and resourceful. With an increasing population of this character, it is manifest that nothing that is possible to be done to secure success will be left undone, and that there must ensue in years to come a fierce strife, first to acquire and then to hold every available supply of water . . . .
>
> It is clear also that the difficulties arising from the scarcity of water in this country are by no means ended, but, on the contrary, are probably just beginning. [*Katz v. Walkinshaw*, 141 Cal. 116, 127-128; 74 P. 766 (1903).]

Recognizing this fact, both the California Legislature by statute (California *Water Code* § 100) and California Courts by judicial decision have followed a policy of establishing rules to promote the maximum use of the scarce water resources of the state. One of the rare departures from that policy by the Supreme Court of California resulted in the 1928 constitutional amendment, now Article X, Section 2 of the *California Constitution* commanding that:

> [T]he water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented,

> and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.

The issue posed in this case is whether the State Water Resources Control Board has the authority to order measures that would result in the conservation of waters otherwise wasted when a local public agency fails to adhere to this constitutional mandate. The California Court of Appeal in this case answered this question affirmatively, which clearly was sound and good public policy.

Although the operation of irrigation systems under California law is in the first instance within the control of the local public entity, those entities often have little incentive to prevent the waste of water, particularly where the supply is sufficient as to them. Those public entities are controlled by boards of elected officials who are accountable only to their local constituents and who have no reason to show any concern for the rest of the state's citizens, particularly when the implementation of conservation measures in response to such concerns would result in added expense to their constituents. There is no more dramatic case of how this situation can produce a gross waste of water than the instant case. Therefore, there is a compelling need in California law for a disinterested state agency to protect the public interest in maximizing the use of the State's scare water resources.

It has been long established that the provisions of the United States Constitution impose no barrier to this kind of state regulation of its local public agencies. (*Trenton v. New Jersey*, 262 U. S. 182 (1923), upholding validity of state license fee imposed upon water diversions to promote water conservation.) The Court of Appeal in this case has ruled

that this regulation does not contravene California law. Thus, in desperation, IID has now resorted to arguing that this regulation of its affairs violates federal statutory law, the Boulder Canyon Project Act.

B. The Boulder Canyon Project Act Does Not Preclude All State Regulation

The Boulder Canyon Project Act by its own terms does not expressly pre-empt all state regulation. To the contrary, Section 18 of the Act states:

> Nothing herein shall be construed as interfering with such rights as the states now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control and use of waters within their boarders, except as modified by the Colorado River Compact of other interstate agreement.

Although Section 14 of the Boulder Canyon Project Act stated that the Act was to be supplemental to the Reclamation Act of 1902 (43 U.S.C. §§ 372 et seq.), and that under the latter the federal reclamation projects must conform to state water rights law in most instances [*California v. U.S.*, 438 U.S. 645 (1978)], this Court has held that the unique nature of the Colorado river system combined with the Secretary of Interior's contracting power under Section 5 of the Boulder Canyon Project Act give the Secretary wide latitude to choose with whom to contract within a state and how to allocate each state's share of the River and in that respect, state law has no place. [*Arizona v. California*, 373 U.S. 546, 575-590 (1963).] But the Court also noted that this did not mean that all state regulation was pre-empted:

> Section 18 plainly allows the states to do things not inconsistent with the Project Act or, with federal control of the River, for example, regulation of the use of tributary water and protection of present perfected rights. (*Arizona v. California*, 373 U.S. at p. 588.)

1. Decision 1600 Does Not Interfere with the Secretary's Section 5 Contract Power.

State Board Decision 1600 is consistent with the provisions of the Boulder Canyon Project Act and is therefore valid. Nothing in Decision 1600 affects the Secretary's ability to control the Colorado River — indeed he is not obligated to do anything under that order. What is affected is IID's management of its own distribution system once the water is delivered by the Secretary through the All American Canal.. Decision 1600 does not disturb the priority system applied by the Secretary to California users.[3] Not a single acre of land within IId's jurisdiction is taken out of production in order to furnish water to those with a lower priority. Nor does Decision 1600 interfere with the Secretary's

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[3] Although Section 5 of the Boulder Canyon Project Act as construed by this Court gave the Secretary authority to contract with whomever he wished, provided he protected present perfected rights, the Secretary chose to exercise this discretion in California in a very rational fashion, requesting the State Engineer's recommendation. The State Engineer in turn requested the California public agencies to agree among themselves how to allocate the waters, the result being the seven Party Agreement, which the State Engineer recommended to the Secretary and which the Secretary has incorporated in all contracts with California public agencies. [Wilbur & Ely, *The Hoover Dam Documents*, pp. A479-A483, pp. A487-A489 (1948).]

contracting power. Not a single person is authorized by Decision 1600 to use the conserved water. Instead, what Decision 1600 does is to maximize the supply of water available to the Secretary in order to satisfy all of the demands of those users with whom the Secretary has already contracted to deliver water.

2. Decision 1600 Does Not Impair IID's Present Perfected Rights.

Decision 1600 does not in any way impair IID's present perfected rights as decreed by this Court. [*Arizona v. California*, 439 U.S. 419, 429 (1979).] As this Court noted in *Bryant v. Yellen*, 447 U.S. 352 (1980):

> We nevertheless clearly recognize that Section 6 of the Project Act, requiring satisfaction of present perfected rights, was an unavoidable limitation on the Secretary's power and that in providing for these rights, the Secretary must take account of state law. In this respect, state law was not displaced by the Project Act and must be consulted in determining the content and characteristics of the water right that was adjudicated to the District by our decree.

(447 U.S. at pp. 370-371.) The California Court of Appeal squarely held with respect to IID's present perfected rights that under California law, IID has only vested rights to the reasonable use of water and has no right to waste or misuse water because of the state policy embodied in Article X, Section 2 of the California Constitution. [*Imperial Irrigation District v. State Water Resources Control Board*, 223 Cal. App. 3d 548, 562-564; 275 Cal.. Rptr. 250 (1990).] In

other words, the state regulation works no impairment of IID's state law water rights. Since the 1928 constitutional amendment preceded the adoption and effective date of the Boulder Canyon Project Act, IID's pre-existing state law water rights which became present perfected rights protected by Section 6 of the Boulder Canyon Project Act did not carry with them an immunity from this kind of regulation.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Dated: July 10, 1991

Respectfully submitted,

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By _____

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COACHELLA VALLEY WATER DISTRICT